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No. 94-405

In The

Supreme Court of the United States

October Term, 1994

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Argument 1

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES:

Batson v. Kentucky, 476 U.S. 79 (1986) 2

Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466 (1991) 7, 8

Hutto v. Davis, 454 U.S. 370 (1982) 5

Powell v. Texas, 492 U.S. 680 (1989) 6

Powell v. United States, 469 U.S. 57 (1984) 7, 8

Rummel v. Estelle, 445 U.S. 263 (1990) 5

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) 3

United States v. Carson, 969 F.2d 1480 (3d Cir. 1992) 7

United States v. Ojeda Rios, 495 U.S. 257 (1990) ... 3, 4, 5, 6

United States v. Shabani, ___ U.S. ___, No. 93-981 (Nov. 1, 1994) 9

Vastola v. United States, 497 U.S. 1001 (1990) 5

Yates v. Aiken, 484 U.S. 211 (1988) 6

STATUTES AND RULES:

18 U.S.C. § 2518(8)(a) 1, 2, 3, 4, 6

Sup. Ct. R. 10(1) 5

MISCELLANEOUS:

The American Heritage Dictionary of The English Language (3d ed. 1992) 1

The New Shorter Oxford English Dictionary (1993) 1

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1. "A satisfactory explanation is a 'prerequisite' for use of the tapes, but the statute does not state that it must precede use of the tapes." (Brf. in Opp. at 8) On this opaque reasoning rests the Government's contention that it does not violate the plain language of 18 U.S.C. § 2518(8)(a) to permit the prosecution to supply the explanation for a sealing delay after the tapes have already been used to obtain a conviction – indeed years later, following appeal. But the noun "prerequisite" is universally understood to mean something that is "[r]equired or necessary as a *prior* condition." *The American Heritage Dictionary of The English Language* 1431 (3d ed. 1992) (emphasis added); *see also The New Shorter Oxford English Dictionary* 2338 (1993) ("A thing required as a prior condition"). Thus, § 2518's provision that "[t]he presence of the seal provided for by this section, or a

satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom" necessarily means that the explanation must precede the use.

The Government's curious, if not desperate, citation to *Batson v. Kentucky*, 476 U.S. 79 (1986), as sole purported support for its rather amazing position that "prerequisite" does not mean precede is testament to the hollowness of that position. *Batson*, of course, had nothing to do with statutory requirements and, even by analogy, is wholly inapplicable to the situation here where the command of § 2518 controls. Moreover, the word "prerequisite" appears nowhere in *Batson*, nor is the concept considered. True, in *Batson*, where "the trial court flatly rejected the [defendant's] objection without requiring the prosecutor to give an explanation," *id.* at 100, the matter was remanded for the trial court to decide if the facts established a prima facie case of purposeful discrimination and, if so, to reverse the conviction if the prosecutor did not come forward with a neutral explanation for his peremptory challenges. *Id.* But that is nothing like what happened in this case, where the Government had every opportunity before trial to provide an explanation for the sealing delay.

Here the defendant moved in writing prior to trial to suppress the tapes at issue on the grounds that the Government had failed either to submit them immediately to a judge for sealing or to provide a satisfactory explanation for not doing so as required by § 2518. The Government submitted a written response, yet, even though put on notice that a satisfactory explanation for the delay was required, chose not to provide one, arguing instead that a delay in sealing tapes is not grounds for suppression as long as the integrity of the tape recordings is preserved. The district court, *after* reviewing the submissions, agreed with the Government that "the integrity of the tapes has not been questioned, and thus suppression is not mandated." App. 286. Thus the district court did nothing at all

either to impair the Government from providing the explanation or to render providing an explanation academic.

Since the Government had the opportunity, as well as the obligation, to provide the explanation, the court's *subsequent* decision did nothing to vitiate that opportunity. The district court's statement in its opinion on remand that the remand was "the first time the government has been afforded the opportunity to present evidence on the issue as this court did not expect such evidence at the time of the sealing delay" – which statement, not surprisingly, is quoted at pages 4-5 of the Brief in Opposition – is inaccurate at best and revisionist at worst. An explanation was required by the statute and demanded by the defendant's motion; it was in no way contingent upon the court's expectations.[1] Indeed, the Government chose not to provide the explanation well before the court even considered the defendant's motion. Thus, the citing of *Batson* is misplaced.[2]

Unable to reconcile this case with the plain language of § 2518, the Government apparently feels more secure in arguing that *United States v. Ojeda Rios*, 495 U.S. 257 (1990), "does not support petitioner's view of the statute." (Brf. in Opp. at 8) Even if that statement were true, the terms of the statute would nevertheless control. But it

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[1] Moreover, it is Petitioner's position that, under § 2518(8)(a), an explanation for a sealing delay is a prerequisite to the use of tapes even if a defendant never moves to suppress the evidence. *See* Pet. at 17.

[2] A better lesson to be drawn from the *Batson* line of cases is that belated acceptance of a prosecutor's reasons for suspect peremptory challenges "risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations," and reserving decision until after trial "may create a subtle pressure for even the most creative district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial." *United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990).

is not true. While the facts of *Ojeda Rios* are indeed distinguishable since the prosecutor there did offer an explanation for the sealing delay as a prerequisite for use of the tapes, and while it is true as a technical matter that the timing issue was not raised in *Ojeda Rios* and therefore the Court did not "hold" that the actual explanation for the delay must be made on the record before the tapes are admitted (Brf. in Opp. at 8), that conclusion is a necessary implication of the Court's holding. The Court expressly noted that "[s]ection 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that '[t]he presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, *shall be a prerequisite* for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom. . . . ' " 495 U.S. at 260 (footnote omitted) (emphasis added), *quoting* § 2518(8)(a). Thus, unless the illogic of the Government's "prerequisite-doesn't-mean-precede theory" can be imputed to this Court, *Ojeda Rios* certainly does "support petitioner's view of the statute."

Moreover, in remanding the case before it for further proceedings, the *Ojeda Rios* Court stated that the explanation offered to the Court "is not 'satisfactory' within the meaning of the statute unless it was relied on *at the suppression hearing* to explain the sealing delays." *Id.* at 267 (emphasis added). And finally, although obviously not the "holding" of the Court, the concurring justices emphasized that the "satisfactory explanation" must be the actual reason for the delay presented to the district court, not a *post hoc* explanation. *Id.* at 267-68. Thus, again, *Ojeda Rios* supports Petitioner's view of the statute.

The merit of Petitioner's claim is thus compelling, and the Solicitor General's response is uncharacteristically feeble, yet the Government would brush this issue under the rug by having the Court deny certiorari because "the issue is unlikely to arise in the future." (Brf. in Opp. at 9) Assuming the Government's prediction is

true, that would be a weighty consideration in an ordinary case. But this is not such a case, and the Court may grant certiorari "when there are special and important reasons therefor." Sup. Ct. R. 10(1). This case is before the Court for the th time. On Petitioner's first petition, following the initial affirmance of his conviction, the Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of *Ojeda Rios*. *Vastola v. United States*, 497 U.S. 1001 (1990). When the court of appeals held on remand that whether the Government could provide a *post hoc* explanation for the sealing delay was a matter left to the district court's discretion, Petitioner brought his second petition, raising the very question at issue now and asserting that the court of appeals had failed to heed *Ojeda Rios* as directed by this Court. (Pet. in No. 90-907 at 9) The Solicitor General responded that the question was not ripe for review, since the district court might agree with Petitioner that the Government was foreclosed from providing an explanation for the sealing delay on remand, and in the event the courts below disagreed with Petitioner he would be free to petition this Court. (Brf. in Opp. in No. 90-907 at 5-6) That event having come to pass, the Government now says, "Why bother?"

In *Hutto v. Davis*, 454 U.S. 370 (1982), the Court had remanded the case to the court of appeals for reconsideration in light of the Court's intervening decision in *Rummel v. Estelle*, 445 U.S. 263 (1990), but the court of appeals adhered to its original affirmance. *Id.* at 372. In a per curiam decision, this Court then reversed "[b]ecause the Court of Appeals failed to heed our decision in *Rummel*." *Id.* The Court acknowledged that arguments might be made one way or the other whether the case before it was distinguishable from *Rummel*, *id.* at 375, but cautioned that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be

followed by lower federal courts no matter how misguided the judges of those courts may think it to be."[3] *Id.* *See also Powell v. Texas*, 492 U.S. 680, 681 (1989) (where this Court remanded for further consideration in light of intervening decision, Texas court's adherence to affirmance reversed, because "inconsistent with" intervening decision); *Yates v. Aiken*, 484 U.S. 211, 214 (1988) (reversing judgment after granting certiorari "because we are concerned that the South Carolina Supreme Court had not fully complied with our mandate" for further consideration in light of intervening decision).

This Court's initial grant of certiorari to Petitioner Vastola is rendered meaningless if on remand the court of appeals is permitted to disregard the plain thrust of *Ojeda Rios* and ignore the plain language of 18 U.S.C. § 2518 and if, when Petitioner seeks the redress which the Solicitor General has previously asserted would be open to him, the Government can prevail on an argument that this issue is unworthy of review because "unlikely to arise in the future." That result is particularly odious where the Government's position on the merits is so shallow.

2. The Government is doubly wrong in maintaining that the court of appeals assessed the government attorney's explanation for the sealing delay under a "more stringent" standard than required by *Ojeda Rios* and that the result reached did not in any event conflict with *Ojeda Rios'* holding that a mistake of law resulting in a sealing delay is a "satisfactory" explanation if it was "objectively reasonable at the time." (Brf. in Opp. at 10) The court of appeals' standard was *less* stringent, not more so, because even after expressly finding that the mistake of law was *not* objectively reasonable – which would require suppression under *Ojeda Rios* – the court went on to find that the explanation was "satisfactory" anyway because the

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[3] Here it appears that the court of appeals may indeed have considered *Ojeda Rios* "misguided." *See* Petition at 15 n. 3 discussing the court of appeals' footnote at App. 83 n. 18.

objectively unreasonable mistake of law had been arrived at reasonably. That the court may have felt "constrained" by its own precedent, *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), to arrive at this wrong-headed result is immaterial to whether this Court should review that seriously flawed determination.

3. The Government sees nothing wrong in the combined application of the holdings of *Powell v. United States*, 469 U.S. 57 (1984), and *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991), since they reflect corollaries of the same principle: that each count of an indictment is reviewed for sufficiency of the evidence supporting it without regard to how the jury arrived at its verdict. (Brf. in Opp. at 11) That *Powell* and *Griffin* may reflect corollaries of this principle – which greatly oversimplifies those decisions – does not answer the question whether it is appropriate to apply them in tandem. Both *Powell* and *Griffin* involved an assessment of *probabilities*: in *Powell* that it was "equally possible" the jury's inconsistent verdicts benefitted the defendant, not the prosecution, 469 U.S. at 65; in *Griffin* that, even though a general verdict gives no assurance that the jury convicted on a ground unsupported by sufficient evidence rather than a sufficiently supported alternate ground, the chance was "remote." 112 S.Ct. at 469, 474. Given those probabilities – and such prudential considerations as the prosecution's inability to appeal an inconsistent verdict or an acquittal – inconsistent verdicts should not be reviewable, *Powell*, 469 U.S. at 65-66, and general verdicts are valid so long as legally supportable on one of the grounds submitted, *Griffin*, 112 S.Ct. at 469.

But these probabilities do not hold up when *Powell* and *Griffin* are applied one atop the other to sustain a verdict that is *both* inconsistent and supported by at least one ground that is invalid. *Griffin* assumes jury *rationality*: that jurors' "own intelligence and expertise" will save them from relying on the factually inadequate ground. 112 S.Ct. at 474. *Powell*, on the other hand, acknowledges the *irrationality* of inconsistent verdicts.

469 U.S. at 478. Thus, the chance is no longer "remote" that the jury relied on the invalid ground, because the inconsistent verdict is evidence that the jury did not act rationally. While there must necessarily be some speculation in this analysis – indeed in every case of trial error there is speculation whether it affected the verdict – it is warranted where, as here, the verdict is *doubly* flawed.[4]

4. The Government argues that the court of appeals' later affirmance of Petitioner's Count 1 RICO substantive conviction provides alternate grounds for affirming his Count 3 RICO conspiracy conviction, without regard to the collection of the Dwek debt and irrespective of whether the court of appeals is correct that a RICO conspirator need not agree to participate personally in the predicate acts. (Brf. in Opp. at 12-14) The court of appeals' affirmance of the Count 1 RICO substantive conviction, however, rests on the court's combined application of the holdings of *Powell v. United States* and *Griffin v. United States*. If this Court agrees with Petitioner that

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[4] The Government states that the conviction on the Count 1 substantive RICO charge was supported by sufficient evidence on two of the four alleged predicate acts and "Petitioner does not contend to the contrary." (Brf. in Opp. at 11) Petitioner did contend to the contrary in the court of appeals and has not abandoned that position, but it is not material to the legal question presented.

Petitioner also wishes to correct the misstatement in the opening sentence of the "Statement" in the Government's brief, which reports that Petitioner "committed various crimes, including extortion, schemes to defraud suppliers, and insurance and bankruptcy fraud." (Brf. in Opp. at 2) Although Petitioner's *co-defendant* was charged with schemes to defraud suppliers and with insurance fraud, Petitioner was not. As to bankruptcy fraud, Petitioner was *acquitted* of those charges. As to extortion, the jury found Petitioner guilty of conspiring to make and to collect one extortionate extension of credit (a business loan), but did not find him guilty of the substantive offenses.

those holdings should not be applied in tandem, no alternate grounds for affirming the Count 3 RICO conspiracy conviction would exist, and the questions raised by Petitioner regarding that conviction should be addressed.

The Government, citing *United States v. Shabani*, No. 93-981 (Nov. 1, 1994), may correctly distinguish between the offense of collection of an unlawful debt, which requires that the defendant participate in the collection directly or as an aider and abetter, and the offense of conspiracy to collect an unlawful debt, which requires only an agreement to collect the debt, not participation in the collection itself. (*See* Brf. in Opp. at 12-13) But the distinction between a RICO substantive offense, as to which the court of appeals found the evidence insufficient, and a RICO conspiracy, as to which the court of appeals found the evidence sufficient, based on the same predicate offense of collection of an unlawful debt, is lacking.

If Petitioner did not participate in the collection either directly or as an aider and abetter – which the court of appeals necessarily found in concluding that the evidence of the Count 2 substantive RICO offense was insufficient – then he could not have been convicted of the Count 3 RICO conspiracy. This is so because Count 3 of the indictment alleged a RICO conspiracy "through the collection of unlawful debt, as set forth in paragraph 2 of Count 2," and paragraph 2 of Count 2 alleged a RICO substantive offense "through the collection and attempted collection of unlawful debts," *not* through *conspiring* to collect the debts. Consequently, the Government is wrong in arguing that the Count 3 conviction is valid "because the evidence showed that petitioner agreed to conduct the affairs of the enterprise through collection of the unlawful debt, although it showed that he *agreed* that someone else, not he would collect that debt." (Brf. in Opp. at 12-13; emphasis added.) The court of appeals found that Petitioner did not participate in the collection of the debt directly or as an aider and abetter,

and mere *agreement* to collection of the debt was not charged in the indictment as an eligible predicate offense.

To the extent the Government is arguing, and the court of appeals held, that the agreement to collection of the unlawful debt served double duty to establish both a predicate conspiracy – albeit not one charged in the indictment as a predicate – and a RICO conspiracy, the Court should grant certiorari to decide whether this is permissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 16, 1994

Respectfully submitted,

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